



Comptroller General
of the United States

Washington, D.C. 20548

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Decision

Matter of: Border Maintenance Service, Inc.--
Reconsideration

File: B-250489.4

Date: June 21, 1993

Donald E. Barnhill, Esq., and Joan K. Fiorino, Esq., East & Barnhill, for the protester.
Behn Miller, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. The General Accounting Office's resolution of protest without holding a hearing does not constitute error warranting reconsideration of prior decision where the written record contained no inconsistent statements or evidence suggesting questionable or incomplete testimony by the contracting agency and there were no deficiencies otherwise apparent in the record.

2. Request for reconsideration is denied where it is based on evidence that could have been but was not submitted by protester in the course of the original protest.

DECISION

Border Maintenance Service, Inc. (BMS) requests reconsideration of our prior decision, Border Maint. Serv., Inc., 72 Comp. Gen. 101 (1993), 93-1 CPD ¶ 97, in which we denied BMS' protest against the award of a contract to PCT Services, Inc., under request for proposals (RFP) No. DADA11-92-R-0016, issued by the Department of the Army as a competitive small disadvantaged business set-aside under section 8(a) of the Small Business Act, 15 U.S.C. § 637(a) (1988 and Supp. III 1991), for hospital housekeeping services at the Brooke Army Medical Center (BAMC) and the United States Army Institute of Surgical Research.

We deny the request for reconsideration.

BACKGROUND

The BMS Protest Decision

The requirement was designated as a competitive 8(a) procurement because the yearly cost of the contract was expected to exceed \$3 million, see Federal Acquisition Regulation (FAR) § 19.805-1(a), and was classified under Standard Industrial Code (SIC) 7349, "Building Cleaning and Maintenance Services."¹ Additionally, because the required hospital housekeeping services were being purchased to meet the specific needs of one user--the BAMC--in one geographic location--San Antonio, Texas--the Small Business Administration (SBA) classified this procurement as a "local buy" competition. See 13 C.F.R. § 124.100 (1993); FAR § 19.801.²

With regard to local buy competitions, the appropriate SBA Assistant Regional Administrator (ARA) for Minority Small Business Concerns and Capital Ownership Development--in this case the Dallas Region ARA--is charged with determining a geographic region of competition based on his knowledge of the 8(a) portfolio; only those firms located within the designated geographic area are eligible to submit offers. 13 C.F.R. § 124.311(h)(3). As a general rule, the designated geographic region of competition is the "geographical boundaries of one or more district offices or the entire region" surrounding the local-buy site; however, if the ARA determines that there is not a reasonable expectation that at least two firms within the region will submit offers, the ARA may authorize the procuring agency to accept offers from 8(a) firms located in one or more adjacent regions. Id.

In offering this requirement to the 8(a) program, the Army had advised the SBA that the agency would only consider

¹For 8(a) procurements, the government uses a SIC code system, which defines activities by industry categories and indicates either a maximum number of employees or annual receipts allowed for a business concern to be considered small within that particular industry. This system is published in the SIC Manual, which is also set out in FAR § 19.102(g). SIC code 7349, "Building Maintenance Services," sets forth an annual receipt size standard of \$8 million.

²SBA is divided into 10 regional offices which supervise many smaller district offices; by letter dated February 11, 1992, the Army formally offered the requirement to SBA's San Antonio District Office--where the BAMC is located--which referred the procurement request to its supervising Dallas Regional Office, as required by FAR 19.804-2(b).

proposals from those 8(a) participants who could demonstrate an existing "minimum" company experience of "creditable performance of hospital housekeeping services for 24 months within the previous 36 months from the date established for receipt of proposals"; in this regard, the Army had determined that this company experience requirement would help ensure that the agency would not encounter the "quality performance problems," which it had encountered with another, less-experienced 8(a) contractor who was performing these same services at another Army medical facility.

Because this company's experience requirement exceeded the reported capabilities of those 8(a) firms located within the immediate San Antonio district, and was more stringent than the cleaning experience requirements used in other procurements conducted under the same SIC classification, the Dallas ARA initially decided to expand the field of competition for this requirement beyond the San Antonio District to include any qualified 8(a) firm located within the Dallas Region. However, after receiving objections from the Army, which was requesting a broader, nation-wide field of competition, and after researching the reported qualifications of the 11 Dallas Region 8(a) firms eligible for this competition with each firm's supervising small business opportunity specialist (BOS)--who is the designated district SBA employee charged with monitoring and assisting each 8(a) participant's progression through the 8(a) program, see generally 13 C.F.R. §§ 124.100, 124.302--the Dallas ARA determined that he could not reasonably expect 2 of the 11 known Dallas firms, "considering the existing skill and experience of such concerns at that time," to "submit responsive offers." Accordingly, the Dallas ARA decided to expand the geographic boundaries of competition eligibility beyond the Dallas Region.

Although the Army had requested that this requirement be conducted as a nation-wide competitive 8(a) procurement, the Dallas ARA determined that such an expansion would be "too great"; instead, the Dallas ARA sought to expand the eligibility boundaries to include only one adjacent geographic region. There are four SBA regions adjacent to the Dallas Region: Atlanta; Kansas City; Denver; and San Francisco. After learning from the Atlanta ARA that there were five 8(a) firms in the SBA's Atlanta Region which had 2 years of recent experience in successfully performing these services under the same SIC category, the Dallas ARA expanded the geographic eligibility boundaries of competition for this requirement to include the Atlanta Region. On September 11, after competing this requirement among 17 8(a) firms located in the Dallas and Atlanta regions, the Army selected PCT--an Atlanta Region 8(a) firm--for contract award.

In its protest to this Office, BMS challenged the award to PCT on the grounds that SBA had improperly expanded competition for this requirement to include Atlanta Region firms. Specifically, BMS argued that the Dallas ARA could not have reasonably expected that fewer than two 8(a) firms located in the Dallas Region would submit offers; in this regard, BMS argued that the Dallas ARA expanded competition for this requirement only to satisfy the Army's demands.

We found that the Dallas ARA had a reasonable basis to believe that the Army would not receive offers from two Dallas Region firms since the record clearly showed that at the time of the geographic eligibility determination, none of the Dallas 8(a) concerns held the requisite 2 years of hospital housekeeping experience. In this regard, although the record showed that the Dallas ARA was advised by several SBA BOSSs that the "concerns might acquire [the requisite] experience through subcontracting, teaming, or hiring the experienced personnel," in light of the critical nature of the hospital housekeeping services, the decreased performance risk reflected in requiring any eligible 8(a) firm to hold 2 years of recent experience in this area, and the fact that this requirement was more stringent than the experience required for most hospital housekeeping procurements conducted under SIC 7349, we concluded that the record reasonably supported the Dallas ARA's determination that the ability of these firms to obtain the requisite experience in time to compete for this procurement was sufficiently speculative so as to conclude that fewer than two firms could submit offers for this requirement. Accordingly, since 13 C.F.R. § 124.311(h)(3) expressly permits SBA to expand the geographic region of competition for a local buy under these circumstances, we found unobjectionable SBA's decision to expand the geographic region of competition to include the Atlanta Region 8(a) firms.

The BMS Protest Proceedings

In resolving this protest, our Office requested elaboration from SBA on a statement made by the Dallas ARA in an affidavit submitted as part of the agency report,³ wherein the ARA stated that:

"As a result of BAMC's inquiries, various persons in the [Dallas] region had considered further the qualifications of the 11 [Dallas Region 8(a)]

³Within 25 days after receiving telephone notice of a protest by this Office, the contracting agency responsible for the challenged procurement is required to file a written report responding to the protest. See Bid Protest Regulations, 4 C.F.R. § 21.3(c) (1993).

concerns for performing the procurement. Based on the information provided me, I determined that there was not a reasonable expectation that at least [2] of the 11 Dallas region concerns, considering the existing skill and experience of such concerns at that time, could submit responsive offers." (Emphasis added.)

Specifically, we asked the Dallas ARA to clarify what "information" he was referring to in his statement set forth above.

On Friday, January 22, SBA responded to our request with a cover memorandum and a sworn, 3-page "Supplemental Declaration" executed by the Dallas ARA, which provided in relevant part:

"I understand that [the General Accounting Office] has requested me to indicate what . . . information I considered.

"I and persons assigned to the [Dallas Regional Office] talked directly with or called the various District Offices in the Dallas region which had one or more of the 11 concerns in their 8(a) portfolio. We talked to each [BOS] . . . who was knowledgeable about the capabilities of the concern on the list over which the BOS had responsibility. We asked whether the concerns could meet a requirement set forth in a February 11, 1992 letter from BAMC offering the procurement for 8(a). That requirement was for creditable performance of hospital housekeeping services for 24 months within the previous 36 months.

"The various BOSs indicated that the concerns did not have that existing experience."⁴

By telephone that same day, this Office asked BMS to submit any comments on the supplemental SBA submission within 1 calendar week--by close of business on Friday,

⁴In this affidavit, the Dallas ARA also explained that while "many [BOSs] indicated that the concerns might acquire such experience through subcontracting, teaming, or hiring the experienced personnel," the ARA nonetheless "determined that there was not a reasonable expectation that at least [2] of the 11 Dallas region concerns, considering the existing skill and experience of such concerns . . . could submit responsive offers" and on this basis, decided to expand the geographic boundaries of competition. [Emphasis in original.]

February 29. On Tuesday, January 26, counsel for BMS contacted this Office by telephone and requested--and was granted--an extension of the supplemental comments deadline to noon on Monday, February 1; on the afternoon of January 26, BMS also submitted a document request to this Office soliciting production of further documentation by SBA to corroborate the Dallas ARA's supplemental affidavit. On Monday, February 1, BMS submitted its supplemental comments which essentially alleged that the Dallas ARA had fabricated the testimony set forth in his supplemental affidavit, and reiterated its contention that the Dallas ARA had acted arbitrarily in expanding the requirement's geographic boundaries for competition eligibility.

PROTESTER'S RECONSIDERATION REQUEST

In its request for reconsideration, BMS argues that several alleged procedural errors by this Office warrant reversal of our prior decision. First, BMS contends that our reliance on the Dallas ARA's supplemental affidavit was improper since we did not request corroborating documents or hold a hearing, as permitted under our Bid Protest Regulations, see 4 C.F.R. § 21.5(a), to ascertain the veracity of the statements made by the Dallas ARA in that sworn statement; in this regard, on reconsideration BMS has proffered an affidavit prepared by its company president to demonstrate that the Dallas ARA's supplemental affidavit contained "misstatements." BMS also contends that we failed to consider the protester's supplemental February 1 comments, and that we improperly failed to grant BMS 10 working days to prepare that submission. We find these arguments without merit.

DISCUSSION

In appropriate cases, a hearing may be held to develop the protest record through oral argument and/or oral testimony; as specified in our Bid Protest Regulations, the determination to hold a hearing is solely within the discretion of this Office. 4 C.F.R. § 21.5(a). As a general rule, we conduct hearings where there is a factual dispute between the parties which cannot be resolved without oral examination and which requires us to assess witness credibility, or where an issue is so complex that proceeding with supplemental written pleadings clearly constitutes a less efficient and burdensome approach than developing the protest record through a hearing. In short, absent evidence that a protest record is questionable or incomplete, this Office will not hold a bid protest hearing merely to permit the protester to orally reiterate its protest allegations or otherwise embark on a fishing expedition for additional grounds of protest; such a result would undermine our obligation to resolve protests expeditiously without unduly disrupting or delaying the procurement process.

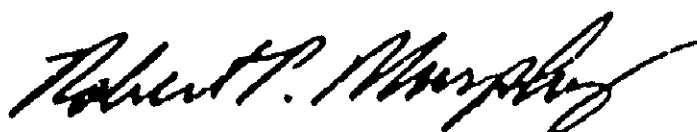
Despite BMS' contentions--both in its February 1 comments and in its current request for reconsideration--there was absolutely no evidence in the record to suggest that the supplemental affidavit submitted by the Dallas ARA--or indeed, any piece of evidence submitted by the agency for the record--had been fabricated or otherwise constituted questionable testimony. Rather, the Dallas ARA's sworn supplemental statement was entirely consistent with other statements made in the record, and the communications referenced therein between the Dallas ARA and his staff and other BOS' and SBA officials were credible--particularly in light of the applicable SBA regulations which vest SBA with broad discretion and contemplate the type of informal internal communications and transactions attested to by the Dallas ARA. See generally 13 C.F.R. Part 124. Moreover, despite being given the opportunity, BMS never provided any basis--beyond sheer speculation--for its allegation that the communications between the Dallas ARA and the BOSs never took place and that the Dallas ARA's affidavit was concocted simply as a "self-serving" statement. In this regard, because agency officials are presumed to act in good faith, any contention to the contrary must be supported by convincing evidence, see Stellar Mfg. Co., B-245857, Jan. 27, 1992, 92-1 CPD ¶ 114; accordingly, since BMS' allegations about the Dallas ARA's affidavit were solely based on inference and supposition and there was no other reason to question the credibility of the affidavit, there simply was no basis for us to compel corroborating document production, conduct a hearing, or otherwise question the veracity of the Dallas ARA.


On reconsideration, BMS has provided this Office with an affidavit signed by the president of BMS which purports to demonstrate that one of the SBA BOS officials told the BMS president that he was never contacted regarding BMS' experience qualifications or capabilities with respect to this procurement. We question the probative weight of this statement since it is clearly hearsay; in any event, this submission is untimely. Our Bid Protest Regulations do not envision a piecemeal presentation of evidence, information or analysis since the failure to make all arguments or submit all information during the course of the initial protest undermines the goals of our bid protest function to produce fair and equitable decisions based on consideration of all parties' arguments on a fully developed record. RC 27th Ave. Corp.--Recon., B-246727.2, May 20, 1992, 92-1 CPD ¶ 455. Since BMS could have--but did not--provide this affidavit during the course of the original protest proceedings--for example, in its February 1 supplemental comments--its presentation of this document on reconsideration provides no basis for reconsidering our prior decision. Eurometalli s.p.a.--Recon., B-250522.5, Apr. 15, 1993, 93-1 CPD ¶ 323.

To the extent BMS contends that its supplemental February 1 comments were never considered by this Office--or that our decision was issued prior to receipt of BMS' supplemental comments--the protester is simply incorrect. In fact, issuance of the decision was delayed pending receipt of BMS' supplemental comments; further, as evidenced by footnote 5 in the protest decision itself, we fully reviewed, considered and dismissed--as "unsupported speculation"--the allegations set forth in BMS' February 1 comments.

Finally, while BMS contends that it was improperly denied 10 working days to prepare its supplemental comments, under our Bid Protest Regulations, 4 C.F.R. § 21.3(j), this 10-day period only applies to initial comments furnished in response to the original agency report. We think that the time period granted by this Office to BMS for preparation of its supplemental comments--from January 22 until February 1, a span of 6 working days and two weekends--provided more than sufficient time for BMS to respond to the Dallas ARA's supplemental affidavit.

The request for reconsideration is denied.



 James F. Hinchman
General Counsel